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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 514

WILLIAM MacDONALD, JAMES J. COLEMAN, R. E. MacDONALD, O. E. SCHAEFFER, R. J. MOORE, HARRY F. WEINBERGER, AND GEORGE E. GILMORE, CO-PARTNERS, DBA TARLTON-MacDONALD COMPANY,

Petitioners and Plaintiffs Below,

vs.

THE UNITED STATES,

Respondent and Defendant Below

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

M. WALTON HENDRY,
BERNARD J. GALLAGHER,
J. ROY THOMPSON, JR.,
Counsel for Petitioner.

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At the outset it should be emphasized that the government form of contract involved here differs from the ordinary form of contract before this Court, in that the contracting officer had sole authority to make final change orders within the general scope of the contract.

Article 3, the *Changes* provision of the standard form of government contract [1] provides that the contracting officer may by written order make changes within the general scope of the contract without approval of higher authority if the estimated amount of the change does not involve more than five hundred dollars. If the change involves more than five hundred dollars it shall not be ordered "unless approved in writing by the head of the department or his duly authorized representative."

From Article 3 of the usual form of government contract, there was deleted in this case the following provision:

> "No change involving an estimated increase or decrease of more then five hundred dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative."

The plain effect of this deletion was to make the decision of the Contracting Officer final, regardless of amount, sub-

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[1] Article 3 of the standard form of government contract is here set out, with the sentence which was deleted appearing in its proper place in italics:

"ARTICLE 3. *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and/or specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. *No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative.* Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered: *Provided, however,* That the contracting officer, if he determines that the facts justify such action, may receive and consider, and with the approval of the head of the department or his duly authorized representative, adjust any such claim asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed." (R. 8, 17, 26).

ject only to the right of appeal by the contractor if he does not agree with the adjustment proposed. In the event of an agreement, a binding contract arises. No one, in or out of the Government, has power to set aside such a decision, once agreed to by the contractor.

The effect of this vital and significant change in this contract is entirely misconceived by the United States in its brief in opposition, for this brief would have this Court believe that, notwithstanding the deletion, the contract should be interpreted as though *all* changes under Article 3 must be first approved in writing by the head of the department or his duly authorized representative. The brief argues that the removal of the restrictive provision has the effect of making the article more restrictive than before. To state the proposition should suffice to show its error.

Inasmuch as the emphasis on the brief for the United States in opposition is primarily upon the point that petitioner's claim is barred, regardless of its merits, because of alleged failure to take timely administrative appeal, this point will be considered first.

Question Presented

The fundamental error of the United States is apparent in its statement of the question presented on page 2 of its brief. In stating the question presented, the United States emphasizes what it alleges to be the failure of the petitioner to make timely administrative appeal procedure stipulated by the contract. What the United States overlooks is that an agreement had already been entered into between the petitioner and the Contracting Officer who was solely authorized to make such an agreement which provided for the payment sought in the suit below. No appeal was necessary or appropriate from this decision, inasmuch as petitioner had agreed to the same. Under the terms of Article 3 this was a final contract, and the United States should not

now be heard to assert that the petitioner should have appealed from any other decision.

No Appeal Was Required

The argument of the United States on page 9 of its opposition is that that timely appeal should have been taken under Article 15 of the contract as Article 3 provides,

> "If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in article 15 hereof" (R. 8).

Assuming arguendo that the appeal provision of Article 15 governs, the fact remains that Article 15 of the contract provides for appeals for "all disputes concerning *questions of fact* arising under this contract" (Emphasis supplied, R. 14). As the United States in its opposition brief agrees that,

> "* * * failure to reach an agreement herein was based on a *question of law,* * * *" (Emphasis supplied, p. 9).

It, therefore, follows that Article 15 does not require an appeal to the head of the department upon the question of law here involved.

The United States, apparently realizing the weakness of its argument based upon Article 15, points out a provision in the specifications which, it asserts, required an appeal. This paragraph is set out in full at page 16 of the brief of the United States in opposition. It will be noted that the only time this specification comes into play is:

> "If the contractor considers any work demanded of him to be outside the requirements of the contract or if he considers any action or ruling of the contracting officer or of the inspectors to be unfair * * *"

In this case, the Contracting Officer ruled, when he was in the exercise of his own free and unfettered judgment, that

plaintiff was entitled to be paid the amount here in controversy as set out in Change Order 33. This was a final ruling by the officer solely competent to make such ruling under the terms of the contract. The petitioner agreed to accept this sum. Obviously he would not consider the ruling to be unfair under those circumstances. There was nothing to appeal from.

The United States emphasizes that the recent case of *United States* v. *Moorman,* No. 97, this Term, decided January 9, 1950, is conclusive in its favor upon the issue here presented. Petitioner submits that this case is authority for the granting of this petition and for reversal of the Court of Claims.

In the *Moorman* case, the Court granted certiorari upon the representation of the Solicitor General, that the decision in the Court of Claims had

> "weakened and narrowed the effectiveness of the well-established policy of the Government to settle without expensive litigation, disputes arising out of contracts,"

and that the effect of such decisions was to,

> "add further doubt and confusion to the authority of designated officers of the United States to make final decisions under Government contracts."

In the case at bar, we have not only a weakening of the policy of the Government to settle, without expensive litigation, disputes arising out of the contract, but a complete reversal of that policy. Here the dispute arising out of the contract was settled between the Contracting Officer, solely authorized to act on behalf of the Government, on the one hand, and the petitioner, on the other. A final settlement and release was executed and signed by both parties (R. 31). The decision below adds doubt and confusion to the authority of officers of the United States to make final de-

cisions under the Government contracts, because, if the decision below stands, then the duly-authorized officer of the United States may never make a final decision on a matter within his exclusive power. The decision below, if allowed to stand, will be notice to all, that decisions by the officer solely authorized to make them will be final only in the event that they are not questioned by other officers of the United States even though such officers have no authority under the contract; that decisions which are agreeable to the contractor and the Contracting Officer are subject to be nullified at the whim of superior officers even though such superior officers have no responsibility or authority under the contract documents to interfere with the Contracting Officer's decision.

The Supreme Court in the case of *United States* v. *Moorman*, cited prior cases of this Court and stated:

> "They stand for the principle that parties competent to make contracts are also competent to make such agreements. The Court of Claims departed from this established principle in *McShain v. United States* (F.) 88 Ct. Cl. 284, where it refused to recognize as final the decision of a Contracting Officer, even though the Government and contractor had agreed that his decision should be final * * * Its holding was considered such a departure from the established contract law that this Court summarily reversed in a *per curiam* opinion, citing only two of the many prior cases on the subject."

The established doctrine of this Court, as thus stated, is precisely applicable to the facts of this case and support this petition. In this case the deletion of the restrictive provision in Article 3 vested full power to make changes solely with the Contracting Officer. His decision was final, unless petitioner was dissatisfied with the same, in which

event he had the right of appeal. In the *McShain* case, this Court reversed the Court of Claims because,

> "It refused to recognize as final the decision of a Contracting Officer even though the Government and contractor had agreed that his decision should be final."

In the instant case, the Court of Claims has refused to recognize as final the decision of the Contracting Officer, even though the Government and the contractor had agreed that his decision should be final. Under the doctrine of prior cases and as re-affirmed in *United States* v. *Moorman,* the Court of Claims should be reversed so that the decision of the Contracting Officer will be given the effect which was intended by the parties to this contract. The *Moorman* case compels reversal.

It must be obvious in this case that the appeals provision has no application, inasmuch as the petitioner entered into a formal contract with the Contracting Officer, to be paid as provided for in Change Order 33; and, therefore, there was nothing for him to appeal from. It would be a strange doctrine, indeed, which would require a contractor with the United States to appeal from all decisions of the Contracting Officer, whether or not he was dissatisfied with them, in order that he would thus be protected against the possibility that a superior officer, but one who under the contract had no authority regarding the same, would direct the abrogation of the contract.

In any event, under a familiar rule of construction if there is ambiguity in the contract the ambiguity must be resolved against the party who drew the contract, that is the United States.

The Contracting Officer Had Sole Authority

The United States asserts that Article 3 of the contract provides that the adjustment or payment for all changes

must be made by the Contracting Officer only after approval of the head of the department or his duly-authorized representative. From this premise, the United States argues that, inasmuch as there was no approval by the head of the department or his duly-authorized representative for payment for the work done by petitioner at the written direction of the Contracting Officer, no payment can be made to petitioner. What the United States disregards is the effect of the deletion from Article 3 of this contract of the customary words that no change involving an estimated increase of more than $500 would be ordered, unless approved in writing by the head of the department or his duly-authorized representative (R. 26). No claim has been made, or is made, by the United States, that this deletion was without the power of the parties. It must follow that the deletion of this provision had some effect upon the power of the Contracting Officer to make changes without the approval of the head of the department first had in writing. The position that the United States has taken in this argument is that, notwithstanding the power of the Contracting Officer to order without limit as to amount, changes in the contract, as set out in Article 3 as here amended, nevertheless, payment therefor must be approved in writing by the head of the department before the United States is obligated to pay for the ordered change. This is legal legerdemain. The obvious purpose of deleting this provision in the standard form contract was to enable the Contracting Officer to expedite this urgent war contract, which was to be completed within sixty days of the date of acceptance (R. 8), and to eliminate delays required by necessity to secure approval of the head of the department for changes. The argument of the United States, if embraced, would lead to the result that all changes, no matter whether insignificant or great, would be required to be approved in writing by the head of the department before payment could

be made therefor. This is just exactly the opposite of the intention of the parties.

A reading of Article 3 of the Contract (R. 8-9) shows that the United States has torn from its context the provision requiring the approval of the head of the department and applied it to the facts in this case when it is inapplicable. Article 3 in the first two sentences sets out the power of the Contracting Officer to make changes, to make an equitable adjustment therefor, and to modify the contract in accordance with the changes and the adjustments. These powers are complete in themselves. The third sentence of Article 3 provides that claims for adjustments under the Article must be asserted within ten days from the date the change is ordered. This sentence also contains a proviso as follows:

> "* * * That the contracting officer, if he determines that the facts justify such action, may receive and consider, and with the approval of the head of the department or his duly authorized representative, adjust any such claim asserted at any time prior to the date of final settlement of the contract." (R. 8)

It is plain that this proviso relates only to procedures to be followed in order to waive the ten-day period for an adjustment and is not a requirement when no waiver of time is needed. The United States in its brief erroneously concludes that this approval of the head of the department is required in all cases. In the instant case there was no necessity to make a claim for adjustment within ten days of the order for the changed work because plaintiff was agreeable to the equitable adjustment proposed and agreed upon between the parties as set out in Change Order 33. The United States contends that it was under this proviso that the Contracting Officer undertook to make the adjustment in the instant case, which adjustment was abortive

because his superior officer failed to approve the same. The fact is that the Contracting Officer did not undertake to make an adjustment under the proviso but undertook to, and did, make an adjustment under his powers granted in the first two sentences of Article 3. There was no dispute between the parties. The adjustment was equitable and was made by parties competent to enter into a contract and is, therefore, final and binding upon both the United States and the petitioner, and petitioner should be paid the sums there agreed upon.

In a footnote to its argument, under paragraph numbered 1 (p. 6), the United States questions the power of the Contracting Officer under Article 3, to order the petitioner to perform as he did in this case. In passing, it may be remarked that the United States has not, until now, challenged the authority of the Contracting Officer to order these changes under Article 3. This argument proves too much. The United States does not challenge the authority of the Contracting Officer generally to bind the United States in contract. It is said only that he may not do so under Article 3. Being competent to make a contract and bind the United States, it would follow that if the work he ordered the petitioner to perform was not within his power under Article 3 of the basic contract, it was within his general power to make a binding contract. The fact is he ordered in writing the work here performed. The petitioner performed the work. The United States received the benefit of the work, and, if not done within the terms of the basic contract, then an entirely new contract arose between the parties. This new contract was written and formalized in Change Order 33, as signed and agreed upon by the Contracting Officer and the petitioner. This new contract had no appeals provisions or any other provisions which would have required the petitioner to pursue any specific remedies. It, therefore, follows that, if the United

States is correct in asserting that the Contracting Officer had no power to order done what he did order done under Article 3 of the basic contract, he did have that general power as a Contracting Officer. He exercised that general power. The petitioner correctly recognized his authority and performed under his written directions. As no technical forms of appeal or other procedures were required under the new contract, it is submitted that no higher authority had the power to refuse to recognize the new contract after performance any more than it could have repudiated the whole basic contract after the work was performed. This argument of the United States logically supports petitioner.

The foregoing paragraphs demonstrate the fallacies of each of the two arguments advanced by the United States in paragraph numbered 1 (pp. 6, 7) of its brief. In addition, however, it should be noted that the two arguments are mutually self-defeating. The United States first argues that the petitioner has no standing because the approval of the head of the department was not obtained for the adjustment or payment here in controversy, as required by Article 3. In other words, petitioner was bound to follow the requirements of Article 3 (as erroneously interpreted by the United States) or lose its right of recovery for work performed for the United States. Yet the government then argues that the work done was not within the power of the contracting officer to order under Article 3. If this is so, how can approval or disapproval of the head of the department sanctify an unauthorized act? The argument must fall.

There Was Consideration

On page 7 of the brief in opposition, appears the conclusion that the petitioner did no more than it was required to under the contract and, therefore, there was no consideration to support the contract and petitioner should

not be paid for what it did. This is the only answer of the United States to the petitioner's legal argument that there was consideration for the agreement entered into between the parties. This point has been covered fully in petitioner's original brief herein (pp. 13-22), and will not be repeated. In passing, it is remarkable that neither in the brief of the United States in the Court below, in the opinion of the Court below, or in the brief filed herein in opposition, has there been a single case or principle of law cited to uphold this novel and unusual conclusion urged by the United States. The United States argues, and the Court of Claims sustained the argument, that, because a lump-sum contractor is required to purchase the lumber that goes into a construction job, the United States, on the ground of lack of consideration, may escape payment of excess costs incurred solely as a result of following written commands by the Contracting Officer to order double the quantities of lumber required for petitioner's own use, to purchase lumber for the exclusive use of the United States to be used on other projects, to require certain timbers to be fabricated, to procure the lumber at once and, regardless of price, when none of these things was required by the contract. And this, even though the Contracting Officer wrote petitioner,

> "* * * You will not be hurt financially by these orders, *making* you purchase at once wherever you can get these items" (Emphasis supplied, R. 30).

The Court below found as a fact that:

> "By reason of the plaintiff's compliance with defendant's instructions to make duplicate purchases of lumber, the defendant secured more rapid progress on the project than would have been obtained had the plaintiff waited for deliveries of the purchases made through the Central Procurement Agency. By such means the defendant also secured a backlog of lumber for other projects at a time when lumber was scarce and difficult to procure" (R. 33).

The Court below found as a fact that the United States received a benefit from petitioner's compliance with the orders of the Contracting Officer. For the Court below to conclude then, as a matter of law, that there was no consideration for the carrying out of these orders of the Contracting Officer, is to fly in the face of every statement of contract law upon the subject by text writers or by the Courts of the United States. It is no wonder that no cases are cited to support this conclusion. If this decision stands, it will be the sole decision of this character in the books. It will stand as a beacon for all who desire to escape from lawful obligations and will be used to defeat all who, in good faith, have heretofore relied upon the principles of consideration, as have been uniformly laid down in our system of jurisprudence. It will stand as a warning to all who deal with the United States in reliance upon the integrity of its officers and of its contracts. It will be a solace to defaulters. It is not the law.

There Was a Compromise Agreement

In paragraph 1 b of its brief (p. 8), the United States attempts to avoid the legal consequences of the fact that there was a dispute between the parties respecting the amount due petitioner, which dispute was resolved by the execution of Change Order 33. The Court below found as a fact (p. 31):

> "There was a disagreement between the contracting officer and the plaintiff as to the correct amount of the adjustment. The plaintiff claimed in the neighborhood of $25,000 and the contracting officer's figure was approximately $15,000. Thereupon a conference was held between the parties and an agreement was reached for an adjustment in the sum of $17,363.27 * * *."

These facts spell out a compromise agreement. Again, neither the United States in any of its briefs, nor the Court below in its opinion, cites a single case or text-writer to sup-

port its conclusion that a compromise agreement fully and fairly entered into can be set aside for lack of consideration. Petitioner, in its brief (pp. 22-28), covered this point and cited a uniform line of decisions supporting its position that this contract is enforceable.

In all Court of Claims litigation, the United States asserts and reasserts that those devices used by the contractors and the United States to settle differences between the parties and to avoid expensive and protracted litigation, should be encouraged. In the instant case, the parties by the use of the give-and-take, which is to be desired in cases of controversy, arrived at a figure which was satisfactory to both the Contracting Officer, duly authorized to represent the United States, and the petitioner. The brief of the United States on this point consists merely of the statement of the conclusion that no valid compromise adjustment was ever reached, and flies in the face of the facts found by the court below.

In numbered paragraph 1-b of its argument (p. 8), the United States again perpetuates its original error in stating that Article 3 of the standard form of contract, as amended in this case by the deletion of the provision that no change involving estimated increase of $500 would be ordered unless approved by the head of the department or his duly-authorized representative, nevertheless requires all changes to be approved in writing by the head of the department or his duly-authorized representative. The fallacy of this argument has been heretofore demonstrated.

The United States in the same paragraph states as a fact that the Division Engineer who ordered the successor Contracting Officer to repudiate the original agreement was the duly authorized representative of the head of the department (p. 8). The United States cites no reference to the findings of the Court of Claims or even to the record below to support this conclusion, nor can it. This Court must

take the facts as shown by the record. There is not a single word of evidence or of fact which supports this conclusion. The fact is that, after the Contracting Officer and petitioner entered into the Change Order 33, under which they compromised the respective claims of the parties, the Division Engineer, the superior officer of the Contracting Officer, disallowed the payment on the ground that petitioner had done nothing more than he was required to do under the contract (R. 31, 32). There is nothing in this record to suggest that the Division Engineer had any authority over or responsibility concerning the Contracting Officer's performance of his duty under this contract, except that he was a superior Army Officer in the chain of command. The Contracting Officer under the basic contract had sole power to order the petitioner to perform as he did and no one could dictate the manner in which he exercised that power. Change Order 33 was forwarded through the Division Engineer because that was the normal channel for communication. The Division Engineer, not as the duly authorized representative of the head of the department, but as an Army officer superior, in grade, ordered the successor Contracting Officer (the original having been transferred) to reverse the prior Contracting Officer and, as a soldier, the Contracting Officer did so. The result of this interference with the Contracting Officer's function, by an individual who had absolutely no responsibility or authority, was to deprive the petitioner of the unfettered and considered judgment of the Contracting Officer. It is fundamental under Government contracts that the individual who is charged with the duty of decision must make that decision. *Goltra* v. *U. S.*, 91 C. Cls. 42, 72; *Burton Coal Co.* v. *United States*, 60 C. Cls. 294, affd. 273 U. S. 337; *Lutz Co.* v. *U. S.*, 76 C. Cls. 405; *Sun Shipbuilding Co.* v. *U. S.*, 76 C. Cls. 154; *Helvetia Milk Condensing Co.* v. *U. S.*, 74 C. Cls. 142; *Williams Eng. & Const. Co.* v. *U. S.*, 55 C. Cls. 349; *Michael H. King* v. *U. S.*, 37 C. Cls.

428. The decision so made by the Contracting Officer was acceptable to petitioner. The decision dictated by another, a stranger to the contract, was no decision, under the law, and a nullity. Under law, petitioner is entitled to the benefits of the decision of the party in whose sole hands the power of decision was vested by the express terms of the contract. The decision below stripped the parties of this right and for that reason alone it should be reversed.

First War Powers Act Is Applicable

In numbered paragraph 2 of its brief, the United States argues that the First War Powers Act and Executive Order 9001 have no application to this case (pp. 8-9).

This is the most amazing argument of all. Its audacity transcends belief. The fact is that the contract was entered into pursuant to the authority of the First War Powers Act and Executive Order 9001. On the cover sheet of the contract itself appears this language:

> "This contract is authorized by the following laws: Section 1(a), Act of July 2, 1940 (Public No. 703, 76th Congress), as continued in effect by Sec. 9, Act of June 30, 1941 (Public Law 139, 77th Congress), Title II of the First War Powers Act, 1941, Act of December 18, 1941, (Public Law 354—77th Cong.), and Executive Order No. 9001, dated—December 27, 1941." (Def. Ex. 8, Pl. Ex. 3)

Notwithstanding this express recital of power the United States for the first time here asserts that there was a want of power in the Contracting Officer under this Act and Order to make the contract expressed in Change Order 33. The officer in the War Department who drew the contract thought it was authorized by the First War Powers Act and the Executive Order. The officer who executed it for the United States thought so, and the War Department has never denied the authority lodged in its officers. The

action of the War Department in recognizing all obligations under the contract, except the point here at issue, amounts to a ratification of authority, and the United States is now estopped to deny the same. This is a belated attempt to avoid the plain consequences of the authorized acts of its officers.

Assuming, however, that further answer is needed on this point, petitioner asserts that the United States is in error in asserting that there was a lack of delegation under the Act and Order. We have shown that there was an express statement of authority written into the contract. Without the express authority, the delegation would be implied under the law and facts. Section 201 of the First War Powers Act, 55 Stat. 839, 50 U. S. C. App. 611, provides that the President may authorize any "department or agency of the Government" to enter into war contracts. The delegation, it should be noted, is to the Department, not the head of the Department. Paragraph 3 of Executive Order 9001 authorizes "The War Department" to amend or modify war contracts "with or without consideration." The delegation is to the Department, not to the individual. The War Department acts through its officers. The Contracting Officer here was an officer of the War Department. The lawful act of the subordinate is presumed to be the act of the Department. *Medkirk* v. *U. S.*, 45 C. Cls. 395, 403; 6 op., Atty. Gen. 583, 587. *Roxford Knitting Co.* v. *Moore & Tierney*, 265 F. 177, 190, cert. den. 253 U. S. 498. The action of the first Contracting Officer was authorized under the Act and Order.

In any event, the First War Powers Act and Executive Order 9001 only serve to avoid the lack of consideration asserted by the United States. It has been amply demonstrated that there was consideration for the contract and there is no necessity to support the contract, as may be done, by resort to these provisions.

In passing it is not unworthy of note that the court below resolved this important point by ignoring it entirely in its opinion. Not a single word appears in the opinion to indicate whether it was even considered or, if considered, what conclusions were reached in the premises.

Conclusion

The issues presented in this case go to the integrity of governmental contracting procedures. If the Government can in war-time obtain from contractors a back-log of lumber to be used on other Governmental projects at a time when lumber was scarce, if the Government can obtain through war contractors the completion of a project sooner than would otherwise have been required by the terms of the contract, if the Government can require contractors to procure lumber through certain sources, regardless of cost, immediately, and only after authorized by the Contracting Officer, all in a manner not required by the basic contract, and, then, after so doing, be sustained by the Court of Claims in refusing to pay that which the Contracting Officer and the contractor agree is a fair price for the work, then let this Court proclaim that this is the law, in order that all who deal with the Government in peace, as well as in war, may be put on notice and may, in the future, protect themselves by increasing their bids for Government contracts, over those which would be normal between contracting parties whose rights are governed by commonly-accepted standards of law. The petition should be granted so this court may state the law on this fundamental point.

Respectfully submitted,

M. Walton Hendry,
Bernard J. Gallagher,
J. Roy Thompson, Jr.,
Counsel for Petitioner.